STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellant,

-vs-

DENNIS WAYNE KURTS,

Defendant-Appellee.

Supreme Court No. 129364

COA No. 259315

Lower Court
No. 04-0365 FH

JERROLD SCHROTENBOER (P33223)
Attorney for Plaintiff-Appellant
Courthouse Building
Jackson, MI 49201
(517) 782-9459

JERRY M. ENGLE (P13194)
Attorney for Defendant-Appellee
1104 W. Michigan Avenue
Jackson, MI 49202
(517) 782-9459

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

JERRY M. ENGLE (P13194)
Attorney for Defendant-Appellee

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF THE QUESTION PRESENTED

IS CARBOXY-THC A DERIVATIVE OF MARIJUANA? AND IS THIS RELEVANT?

The trial court and the Court of Appeals answered:	**"No"**
Plaintiff-Appellant answered:	**"Yes"**
Defendant-Appellee answers:	**"No"**

STATEMENT OF FACTS

The Defendant-Appellee agrees that the Statement of Facts is correct, but not complete. Appellee adds the following:

Officer Scholten from Blackman Township Public Safety made this stop on February 25, 2004, at about 9:44 p.m. The vehicle was driving down the center portion of the roadway, however, there were no dividing lines in the roadway as far as marking the left and right side of the road (P.E.Tr. P41). The smell of alcohol was only "moderate" (P.E. Tr. P42). Mr. Kurts only indicated that he had had two beers at the B-One Bar during the pool league (P.E. Tr. P42). Mr. Kurts did the alphabet and the counting tests fine. There were minor problems on the other tests. The results of the preliminary breath test were .07 (P.E. Tr. P46). (The marijuana has to be even a major issue for completing the arrest, as it does not rise to the level of a .08).

A blood test was done at 10:22 or 10:24 p.m. (P.E. Tr. P47). This is some 38 to 40 minutes after the stop. Mr. Kurts was able to tell the officer what time of day it was. He was able to tell him what day it was. The walking tests and all other tests were fairly normal (P.E. Tr. P48-49). His clothing was orderly, his speech was clear (P.E. Tr. P50).

The major difference between Judge Schmucker's Opinion and that of the Court of Appeals is that Judge Schmucker had dismissed the case in its entirety. The Court of Appeals ruled that this was a factual question for the trier of fact.

It must be remembered that the Defendant, Dennis Wayne Kurts, is charged with operating while intoxicated. The complaint says: "Did operate a vehicle upon a

highway, Key Street, while under the influence of a combination of alcoholic liquor and controlled substance; contrary to MCL 257.625(1). This is as a third offense. He then is charged in Count 2 with operating with the presence of a controlled substance, which says: "Did operate a vehicle upon a highway, Key Street, when he or she had marijuana and/or its derivatives in his or her body. (It should be noted this charge is incorrect as it actually has to be the active ingredient of marijuana.) This is also charged as a third offense. In Count 3, the Defendant is charged with operating a motor vehicle upon Key Street, while his license was suspended or revoked. That count has never been a part of this appeal.

It is clear that both expert witnesses considered 11-COOH-THC, which is known as Carboxy THC as a metabolite of marijuana. (Dr. Adatsi testimony, P.E.Tr. P13, June 22, 2004).

Dr. Adatsi defines a metabolite as something that occurs within the human body (or any other living organism) after a particular substance, be it drug or chemical, has been given to the organism and the organism has acted upon it in a physiological or chemical way to produce this particular product (P.E.Tr. P15).

Dr. Adatsi, of the Michigan State Police Crime Lab, testified: "This metabolite does not have any pharmacological or psychoactive effect on humans." (P.E.Tr. P17). Carboxy THC is actually the second metabolite, as a first metabolite of Hydroxy THC is

formed as the body gets rid of THC (P.E.Tr. P25-26). In and of itself, 11-COOH has no apparent effect on the human body (P.E.Tr. P28).This can be found in urine for up to 30 days after it is ingested (P.E.Tr. P35).

Dr. Michael Evans testified at a motion hearing on October 21, 2004. He was recognized by both sides as an expert. He notes that when serving as the Controlled Substance Adviser for the State of Indiana, Carboxy THC was never defined as, and is not, a controlled substance (P8). Carboxy THC has no pharmacological activity. It doesn't do anything to the body. It is not a scheduled substance by the State of Indiana, federal, or others (P9).

Dr. Evans' lab purchases Carboxy THC regularly from a company they call Safealdrige in St. Louis. They provide it. They do not need a controlled DEA license to purchase that compound (P10).

Dr. Evans defines a derivative as something that has properties of the original compound. A derivative can be made into the original compound. The Carboxy THC has no pharmacological activity. It cannot be made into the original compound. The Carboxy THC formed by virtue of metabolism in the body is by its very definition a metabolite of THC. It is not a derivative.

The doctor goes on to say, at page 11, that if you are going to define Carboxy THC as a derivative of THC, you must also define carbon dioxide as a derivative of THC. He believes the DEA is "basically, trying to do the same thing just to cover the bases in regard to all compounds that will have pharmacological properties that can either be

made into it, or very similar to the structure". At page 15, the doctor testified that THC leaves the blood very quickly, "within three or four hours".

A derivative would have to be something that could be made back into marijuana. You just can't do that per Dr. Evans (P.E. Tr. P22). At page 31, in dealing with the *American Heritage Dictionary* definition, Dr. Evans says: "Essential elements to my mind means pharmacological. There can't be pharmacological activity".

ARGUMENT

I.

IS CARBOXY-THC A DERIVATIVE OF MARIJUANA? **AND IS THIS RELEVANT?**

Carboxy-THC is a metabolite of THC. It is not a derivative of marijuana. The statute itself is made to prevent driving while under the influence of alcohol or drugs having a pharmacological effect. In order words, bad driving as a result of a drug's effect on the body.

A first issue is, what is the objective of the traffic laws themselves. In pertinent part, the statement at the beginning of MCLA 257, which was passed in 1949, says: "An act to provide for the . . . examination, licensing and control of operators . . . and to provide for the regulation and use of streets and highways."

The statute, MCLA 257.625(1) deals with intoxication, and says as follows, in pertinent part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway . . . within this state if the person is operating while intoxicated. As used in this section, 'operating while intoxicated' means either of the

following applies: (a) the person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance."

(b) This section deals with the issue of the presumption at .08 for blood alcohol issues.

Section 8 of the same statute, which is what we are dealing with here, says:

> A person. . . shall not operate a vehicle upon a highway . . . within this state if the person has in his or her body any amount of a controlled substance listed in Schedule 1 under Section 7212 of the Public Health Code." MCLA 257.625(8).

Nowhere in that statute does it say "derivative", "metabolite", or anything else. It just says as listed under 333.7214. Clearly marijuana is listed in Schedule 1. The drug in marijuana is THC.

The chemical that is found here in the blood of Mr. Kurts is Carboxy-THC. Carboxy-THC has no pharmacological effect. (This is admitted by the Prosecutor in its Brief and is stated by both experts in the hearing.) If we go this route we must consider what the metabolites of cocaine, heroin, amphetamines, etc. are. All of those would then be illegal.

Metabolism is a process of breaking down what one ingests, until the remainder is passed from one's system. Is the final metabolite a derivative? If not at what metabolite do we cut it off? Carboxy THC is the second metabolite with marijuana. Is the third or the fourth a derivative? What metabolite is a derivative?

Schedule 1 in MCLA 333.7211 says:

> The administrator shall place a substance in Schedule 1 if it finds that the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."

The experts both testified that Carboxy-THC has no pharmacological activity, i.e. no "potential for abuse". One must get down to the word "derivative" in 333.7212(D) to even get to the issue of whether this metabolite could be anything.

From the standpoint of the Drug Act, the possession of a drug that is illegal under the Act is punishable. The theory behind driving while under the influence is a different theory and a different issue altogether. Driving under the influence and laws to that effect are meant to stop activities that are harmful or potentially harmful to other drivers, passengers, or pedestrians. It is not meant to punish the possession at one time or another of a drug that might be illegal under the Controlled Substances Act.

It would appear that the statute we are dealing with and the objective of the Controlled Substances Act differ. Here we are only dealing with issues that would affect the driving of the Defendant. In the Substance Abuse Act, we are dealing with issues such as, does the person have a schedule 1 substance in their system. The traffic laws in Operating While Intoxicated statutes set a standard for when a person is safe to be driving. The drug laws are outlawing substances because of there potential for abuse. These are different purposes.

It is interesting to note that in 2003, the legislature, on behalf of the courts and the prosecutors office, wrote a section into this much longer statute, under MCL

257.625A(5)(a) that said:

> The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by a chemical analysis of the person's blood, urine, or breath, is admissible into evidence in any civil or criminal proceeding, and it is presumed to be the same as at the time the person operated the vehicle.

This statute would seem to end much of the Prosecutor's argument, in that it does not say derivative or metabolite. It says "controlled substance." The analysis shows a non Schedule 1 metabolite in the Mr. Kurts blood. That is not evidence of anything else, since the statute clearly presumes that is what was in the blood at the time the person was driving is the same as when tested. The section seems to create a presumption that THC was not in Mr. Kurts system as only carboxy-THC a non-schedule 1 substance was in his system. This also answers the prosecutors issue of the court of appeals ruling being to "expensive" to do. It simply can't be done without the legislature changing the law.

The only difference between the Court of Appeals and Judge Schmucker is that Judge Schmucker said there was not sufficient evidence to allow the jury to decide to convict on Count 1 or 2. The Court of Appeals feels that the case should go to the trier of fact on Count 2, and it would be up to the Prosecutor to show sufficient evidence to convict. The burden is proof beyond a reasonable doubt. In this appeal the prosecution says it does not want to meet that burden. If, what they need to show is that the THC was in Mr. Kurts system at the time of the stop, then they must bring in Dr. Adatsi. The defense would need to bring in Dr. Evans. I agree with the prosecution

that this could be expensive in some cases. I don't agree that expense is a reason to lessen the burden in this or similar cases. It goes back to MCL 257.625A(5)(a). Carboxy THC would not be presumed to be a violation of the statute.

The legislature can legislate to include Carboxy THC in the Controlled Substances Act. They chose not to. Metabolites were something that existed and the definitions existed back when this Act was passed. In checking *Webster's New Collegiate Dictionary* published in 1974, it defined a metabolite as "a product of metabolism". Clearly this definition, and the existence of "metabolism" was known at the time they wrote the Act. To now define a derivative to include the metabolite 11-COOH is to do just the opposite of what the Controlled Substances Act means.

The Prosecutor is coming before this Court saying that the Court of Appeals "created legislation". The reality is that the Court of Appeals did not create legislation. It is what the Prosecutor seeks today that would have you legislate to add this metabolite to the list of Schedule 1 controlled substances. In fact it would be difficult to rule and 'not' include all other metabolites. From a defense standpoint this might be good. It could create a flood of new charges and new litigation.

The only logical and legal way to do this is to rule that either the Circuit Court in its Opinion, indicating that it could not find facts sufficient to establish Count 2, is correct and should be upheld, and this matter be dismissed; or, in the alternative, to rule that the Court of Appeals is correct, and that Carboxy THC is evidence of the previous ingestion of THC and the issue of whether the Defendant had THC in his

system at the time he was driving is for a trier of fact to decide. This is in direct opposition to the presumption created in MCL 257.625A(5)(a), as previously cited.

Carboxy THC can stay in the urine for up to 30 days after THC has been ingested. Surely the legislature did not mean to create an issue where the person is stopped and has his blood taken some 28 days after he has used marijuana to a person could get charged under this statute.

The Prosecution also argues, at the top of page 9, that expert tests and expert witnesses will be needed. That is not an issue for this Court. That is an issue for the legislature. If they want to change the Act in any way they should do it. The very argument begs this Court to legislate rather than rule.

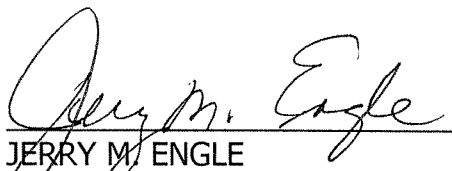
At page 9, the prosecution also gets into the definition of synthetic drugs. Synthetic is defined by *Webster's New Collegiate Dictionary* in relation to drugs as:

> a. Produced artificially: man-made (dyes, drugs and silk), b. Devised, arranged, or fabricated for special situations to imitate or replace usual realities. As a noun, synthetic means: "Something resulting from synthesis rather than occurring naturally. esp: a product (as a drug or plastic) of chemical synthesis."

The statute would have meaning as it would be attempting to keep people from trying to synthesize or make what would then be derivative of a Schedule 1 controlled substance. It is hard to imagine that the legislature passed that statute in an attempt to keep one's body from producing Carboxy THC in the process of metabolism. Again, common sense should prevail.

RELIEF REQUESTED

The Defendant-Appellee requests this Honorable Court: dismiss Count 1 & 2 as has been done by the Circuit Court Judge, or in the alternative, rule that this is a proof issue for the trial court.



JERRY M. ENGLE
Attorney for Defendant-Appellee

Dated: December 21, 2005